DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF THE PETITION OF NORTHWESTERN ENERGY FOR A DECLARATORY RULING ON THE AVAILABILITY OF SCHEDULE QF-1 RATES TO 71 RANCH, LP, OVERSIGHT RESOURCES, LLC, AND DA WIND INVESTORS, LLC	REGULATORY DIVISION DOCKET NO. D2017.6.56

71 RANCH, LP, OVERSIGHT RESOURCES, LLC, AND DA WIND INVESTORS LLC'S RESPONSE TO NORTHWESTERN ENERGY'S MOTION FOR RECONSIDERATION

71 Ranch, LP ("71 Ranch"), Oversight Resources, LLC ("Oversight Resources"), and DA Wind Investors, LLC ("DA Wind") (collectively, the "Projects") respectfully submit this response to NorthWestern Energy's motion for reconsideration of Order No. 7574. The Commission's interpretation and application of ARM 38.5.1902(5) was lawful, just, and reasonable, and NWE's motion for reconsideration should be denied.

I. Determining whether any generation facility is eligible for NWE's standard offer rates under the Commission's rules requires the Commission to find that the project is a qualifying facility under PURPA.

To determine whether any project is eligible for standard offer rates, the Commission interprets and applies its own regulations. ARM 38.5.1902(5) provides that "[o]nly *qualifying facilities* having a nameplate capacity not greater than 3 MW are eligible for standard offer rates."[1] Accordingly, to interpret its own regulation, the Commission must find that the facility is a qualifying facility ("QF") under the Public Utility Regulatory Policies Act of 1978 ("PURPA").

[1] Emphasis added.

In Order No. 7574, the Commission recognized this question is determined under federal law and correctly found that the Projects are three separate 3 MW facilities, each of which is currently certified as QF by FERC.[2] The Commission was also correct when it recognized that NWE has the opportunity to raise its concerns over the Projects' status as three separate QFs before FERC rather than before the Commission.[3] Finding that the Projects are QFs under PURPA was a necessary step in determining whether the Projects are eligible for standard avoided cost rates under ARM 38.5.1902(5). Thus, contrary to NWE's assertions, the Commission applied the right law to determine whether the Projects are eligible for standard offer rates under the Commission's rules.[4]

II. The Commission correctly abandoned the "totality of the circumstances test" as a result of changed circumstances.

The Commission first announced its "totality of the circumstances test" in 2010.[5] Since that time, there have been at least two significant changes to the circumstances before the Commission when it determines whether any project is eligible for standard avoided cost rates.

First, to create a new rule, or "standard, or statement of general applicability that implements, interprets, or prescribes law or policy,"[6] the Montana Administrative Procedures Act requires the Commission to "comply with the public notice and comment procedures detailed in §§ 2-4-302 and -305, MCA."[7] Among other things, these procedures include giving written notice

[2] Order No. 7574 at ¶ ¶ 19, 22, 23.
[3] Order No. 7574 at ¶ 23.
[4] The Commission's rules recognize FERC's exclusive jurisdiction over QF status determinations. ARM 38.5.1902(1) adopts and incorporates 18 C.F.R., Part 292, which sets forth general requirements and criteria for small power production facilities eligible for consideration under PURPA. The Commission's rules also provide that any small power production facility in Montana "which is a qualifying facility under the criteria for size, fuel-use, and ownership established by FERC regulations…is a qualifying facility eligible to participate, under these rules, in arrangements for purchases and sales of electric power with electric utilities regulated by the Commission." ARM 38.5.1902(2).
[5] Order No. 7068b, Docket No. D2010.2.18.
[6] The Montana Administrative Procedure Act defines a "rule" as "each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy." § 2-4-102(11)(a), MCA.
[7] *S. Montana Tel. Co. v. Montana Pub. Serv. Comm'n*, 2017 MT 123, ¶ 15, 387 Mont. 415, 419, 395 P.3d 473, 476.

of the proposed rule, holding a hearing, affording interested parties the opportunity to submit data, views, or arguments, considering comments in those submissions, and issuing a statement explaining its reasons for adopting the rule.[8] The Commission did not follow these procedures when it announced the "totality of the circumstances test" in 2010. But the Commission did follow these procedures in 2015, when it revised ARM 38.5.1902(5) and adopted the current version of that rule. And the plain language of ARM 38.5.1902(5) provides that "[o]nly qualifying facilities having a nameplate capacity not greater than 3 MW are eligible for standard offer rates." There is simply no reference to the "totality of the circumstances" in the Commission's current rule governing eligibility for standard offer rates, despite the fact that the rule was amended *after* the Commission's decision in Docket No. D2010.2.18. The Commission could have adopted the "totality of the circumstances test" as part of its rule governing the eligibility requirements for standard offer rates, but it did not.[9] Instead, the Commission created the straightforward, two-part test which acknowledges FERC's exclusive jurisdiction over QF status determinations and was correctly interpreted by the Commission in Order No. 7574.

Second, in 2010, the FERC had not declared whether the "one-mile rule" in 18 C.F.R. § 292.204(a) was actually a rule or merely a rebuttal presumption. That changed in 2012, when the FERC made it clear that the one-mile rule is a *rule*.[10] The Commission recognized this change in circumstances as part of its reasoned analysis rejecting the "totality of the circumstances test" and denying NWE's petition for a declaratory ruling.[11]

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[8] *Id.*
[9] Separately, imposing such a requirement may have been inconsistent with PURPA given FERC's exclusive jurisdiction over QF status.
[10] *Northern Laramie Range Alliance*, 138 FERC ¶ 61,171 (2012); aff'd, 139 FERC ¶ 61,190 (2012).
[11] Order No. 7574 at ¶ 20.

III. CONCLUSION

The Commission's decision in Order No. 7574 is based on a lawful, just, and reasonable interpretation and application of ARM 38.5.1902(5). The Projects should be eligible for standard avoided cost rates under the Commission's rules, and NWE's motion for reconsideration should be denied.

Respectfully submitted on December 1, 2017.

Holland & Hart LLP

By: s/ *Nikolas S. Stoffel*
Thorvald A. Nelson, #8666
Nikolas S. Stoffel, #13485
Holland & Hart LLP
6380 South Fiddlers Green Circle, Suite 500
Greenwood Village, CO 80111
Telephone: (303) 290-1601, 1626, respectively
tnelson@hollandhart.com
nsstoffel@hollandhart.com

COUNSEL FOR 71 RANCH, LP, OVERSIGHT RESOURCES, LLC, AND DA WIND INVESTORS LLC

CERTIFICATE OF SERVICE

I certify that on this, the 1st day of December, 2017, **71 RANCH, LP, OVERSIGHT RESOURCES, LLC, AND DA WIND INVESTORS LLC'S RESPONSE TO NORTHWESTERN ENERGY'S MOTION FOR RECONSIDERATION** was e-filed with the Commission and served via e-mail, unless otherwise noted, to the following:

Will Rosquist
Montana PSC
1701 Prospect Avenue
PO Box 202601
Helena, MT 59620-2601
wrosquist@mt.gov
via UPS Overnight Delivery

Robert Nelson
Jason Brown
Montana Consumer Counsel
111 N. Last Chance Gulch
Suite 1B, P.O. Box 201703
Helena, MT 59601
robnelson@mt.gov
jbrown4@mt.gov

Al Brogan
Ann Hill
Northwestern Energy
208 N. Montana, Suite 205
Helena, MT 59601
al.brogan@northwestern.com
ann.hill@northwestern.com

Tracy Lowney Killoy
Joe Schwartzenberger
NorthWestern Energy
11 E. Park
Butte, MT 59701
joe.schwartzenberger@northwestern.com

Thorvald A. Nelson
Nikolas S. Stoffel
Holland & Hart, LLP
6380 South Fiddler's Green Circle
Suite 500
Greenwood Village, CO 80111
tnelson@hollandhart.com
nsstoffel@hollandhart.com

Dick Anderson
DA Wind Investors, LLC
3424 Hwy 12 East
Helena, MT 59601
danderson@daconstruction.com

Errol T. Gault
71 Ranch, LP
40 71 Ranch Road
Martinsdale, MT 59053
errol@71ranch.net

Bryan Rogan
Oversight Resources, LLC
13 South Willson, Suite 6
Bozeman, MT 59715
brogan@oversightresources.com

For electronic service only:
aclee@hollandhart.com

s/ Adele C. Lee

10461100_1